No. 21572

In the

United States Court of Appeals For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

IDAHO ELECTRIC COMPANY, INC.
Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENT

ELI A. WESTON
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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board to enforce its order issued against Idaho Electric Company, Inc., hereafter called respondent or Company, on March 16, 1966, following proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*).[1] The Board's

[1] Pertinent provisions of the Act are set forth *infra* in Appendix A.

decision and order are reported at 157 NLRB No. 70 (R. 37-38).[2] This Court has jurisdiction over the proceedings under Section 10(e) of the Act, since the unfair labor practices occurred in Jerome, Idaho, within this judicial circuit, where the Company is engaged in business.

STATEMENT OF THE CASE

I. Section 8(a) (5) Violation

The Board found that the Company violated Section 8(a) (5) of the act by refusing to bargain with the Union. The basis of this holding by the Board and which is disputed by the respondent is the election which was held on February 5, 1965. The evidence in this case reveals that the manner in which this particular election was held is violative of Idaho Law.[2] This section of the Idaho Code requires that a hearing be held prior to the election. The express purpose of this provision is to determine whether or not either the employer or the Union have engaged in coercive activities which could potentially restrain the employees from an exercise of their rights under section 7 of the act. This hearing was not held. As a matter of fact, the Idaho State Department of Labor not only failed to follow the Idaho Code with regard to the conduct of an election but admitted that they were in error in the manner in which this Union was certified under Idaho Law. (Tr. Pg. 49.)

The evidence also shows that the Union organizers threatened the employees bodily violence and harm immediately before the election. (Tr. 147-150).

The testimony from both of these gentlemen indicates

[2]See Appendix "B"

that other of the employees other than the two employees who testified at the time of the hearing, also heard these threatening statements. (Tr. Pages 147, 156 Tr. page 150.)

II. Section 8 (a) (1) Violation

The Board found that the Company, Idaho Electric Company, Inc., violated Section 8 (a) (1) of the Act by making certain interrogation of Company employees regarding their Union activities and sympathies and the identity of the employee who allegedly led the Union movement in the plant. The Board also found that the basis of this charge was the unilateral granting of wage increase to employees Burk and Castro; changing employees working rules and threatening to withdraw and withdrawing certain employee benefits because of the employees Union activities.

However, the Record in this particular case shows that there were isolated instances of employee interrogation, and that these minor interrogations as to Union membership were not accompanied by any threats, promises or, reprisals. (Tr. Pages 122-123.) The Record will also disclose that certain changes were made in company rules after the election was held due to business conditions in the Company. (Tr. 159-160.) The evidence also discloses that the employees had even solicited the Company's opinion as to their attitudes toward the Union. (Tr. Page 114.)

The record will show contrary to the Board's finding that the unilateral granting of wage increases to Employees Burk and Castro was part of a prior wage increase planned and enacted before any attempt to organize by the labor Union. (Tr. Page 159, 163-164.)

The testimony also reveals that there was then and still is a bona fide dispute as to whether or not the Union was the lawfully elected bargaining representative. The unilateral changes in employees working rules were due to working conditions and economic conditions within the industry. (Tr. Page 159-160) The withdrawal of any employee benefit also has sound and justifiable reasons. In addition, as commented above, there was a bona fide dispute as to whether the Union was the properly certified bargaining representative.

III. JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD OVER THIS EMPLOYER.

The Respondent herein, Idaho Electric Company, Inc., is located in a small town called Jerome in Southwestern Idaho. The Respondent employs approximately seventeen persons. The business is operated by a Mr. A. V. Hall and his partner, Bert Hartwell. They have been in business for eighteen years in Jerome, Idaho.

The transcript shows that the business of the Respondent is a retail business and under the applicable decisions the jurisdictional requirements for the National Labor Relations Board is $500,000.00 of gross annual sales. (Tr. Page 151.) The evidence in this case also establishes that the business of the Respondent is strictly a retail business in that all services or sales are to general public for their use or consumption and not for resale. (Tr. Page 22, 23, 26, 27, 40.)

Though the Board found that the Respondent purchased in excess of $50,000.00 from firms located within the State of Idaho who in turn received said goods and merchandise directly from points located outside

of the State of Idaho, it is Respondent's contention that this standard as applied is not applicable. (Record Page 19.)

ARGUMENT

I. SECTION 8 (a) (5) VIOLATION

Briefly stated, it is Respondent's contention that since the election carried on by the Commissioner of Labor of the State of Idaho was not in accordance with the Idaho Statute regulating the same, that said election is invalid and void and that under these circumstances the Respondent has no duty to bargain with the Union. *NLRB v. West Texas Utilities Company*, 26 Labor Cases, Paragraph 68, 551, 214 Federal 2nd 732 (CA-5-1954) ; *NLRB v. Dallas City Packing Company* 230 Federal 2nd 708 (CA-5-1956) ; *NLRB v. Lord Baltimore Press, Inc.*, 300 Federal 2nd 671, (CA-4-1962).

It also been held by the Board that State conducted elections must be free of irregularities or unusual circumstances. *Blue Field Produce and Provision Company*, 117 NLRB 1660 (1967). The record in this case indicates that the State Commissioner of Labor admitted that the election was improperly held and the Union should not be certified. The testimony also disclosed that there were certain threats to the employees made by one of the Union organizers a Mr. Rosen. (Tr. Page 49, 147-150.)

Since the election is not consistent with neither State nor Federal Law Respondent owes no duty to bargain with the Union.

The trial examiner's recommended order and find-

ings bypasses this problem by maintaining that the legality of the State election nor the results of the election are at issue in the case. This proceeds upon the trial examiner's theory that he did not refer to the results of the election in determining the Union's majority status. (R. 21.) That his determination as to the majority status was on the basis of the signing of the representation cards.

The major fallacy of this particular reasoning is that:

1. Both the Union and the Employer under the law are allowed a hearing to determine the majority status for collective bargaining purposes. *NLRB v. West Texas Utilities Company, Supra; NLRB v. Dallas City Packing Company* and *NLRB v. Lord Baltimore Press, Inc. (Supra.)*

2. Both the Employer and the Union are guaranteed that if this election is held under State auspices, that it be conducted properly and without the background of coercion or threats. *Blue Field Produce and Provision Company, Supra.*

3. The trial examiner has over looked the possibility, which forms the basis of the legal right to a hearing before the election, that since the signing of the authorization card an employee may have changed his attitude towards Union membership. The evidence in this case would indicate that this probably actually happened. Why else would Mr. Rosen threaten the employees after receiving the authorization cards that if they didn't vote for the Union he would, "Bust them in the mouth." (Tr. 147-150)

In other words, the fact that they were uncoerced

at the time they signed the authorization cards, is essentially immaterial in that after an election is requested the question is whether or not they were coerced or uncoerced at the time of the election. It is also interesting to note that the Union representative requested the election in this particular situation. (Tr. 63-64.) This would seem to indicate that not only the Employer but also the Union had a substantial doubt as to whether the authorization cards gave them an uncoerced bargaining majority.

It is urged by respondents that once the parties request an election, the law requires that the election be held properly and without any elements of coercion present. If the trial examiner's position is sustained, it will open the door to all types of coercion prior to an election as long as authorization cards were signed. This is certainly not what was intended by Congress in enacting the Labor Management Relations Act.

If this reasoning is to be followed, it would seem by parity of reasoning that all charges against the employer relating to coercion prior to or after the election should be dismissed as being without merit, in that the Union always had a majority anyway.

II. SECTION 8 (a) (1) VIOLATIONS

Briefly, it is Respondent's contention that the activities of the employer in interrogating his employees relative to their Union membership is protected by Section 8 (c) of the Act realtive to free speech and without the background of threats or promises is not unlawful per se. *Blue Flash Express, Inc.* 109 NLRB 591 (1954); *S. H. Kress & Company v. NLRB* (CA-9; 1963) 47 Labor Cases Paragraph 18, 219; *Wayside*

Press v. NLRB (CA-9; 1953) 206 Federal 2nd 862; *NLRB v. Rockwell Manufacturing Company* (CA-3; 1959) 271 Federal 2nd 109.

The transcript shows that the employees admitted prior to the election there were no threats or promises by the employer. (Tr. 122-123.)

The other statements alleged by general counsel and upheld by the trial examiner and the Board constitute trivial interrogation of the employees as to Union memberships and held to be not unlawful. *NLRB v. Coca-Cola Bottling Co.* (CA-7; 1964) 333 Federal 2nd 181; *NLRB v. Pecheur Lozenge Company* (CA-2; 1953) 209 Federal 2nd 393; *Lanthier Machine Works* (1956) 116 NLRB 1029. The other alleged threats or coercion constitute the company representative asking the employees if there were any problems. (Tr. 114) The other alleged threats relate to a meeting wherein it was explained to the employees by the owners that there would have to be a change in rules and regulations concerning the manner in which the plant was being operated. (Tr. 126)

With regard to the unilateral changing of employees working rules and benefits and unilateral granting of wage increases the evidence is directly contrary to the holding of the Board. The evidence shows that the wage increases were granted as an over-all part of the employers wage program, and as such is not in violation of the Act. *Mississippi Valley Structural Steel Company*, 64 NLRB 78; *Knickerbocker Plastic Company*, 96 NLRB 586. In addition, with regard to the unilateral aspect of all of these charges, until it has been determined that the Respondent has a duty to inform the Union because it is the bargaining representative, the

fact that a wage increase or decrease in benefits or change in working rules or conditions is immaterial. With regard to the change of working rules and regulations, the transcript shows that these new regulations were put in to reduce overhead. (Tr. 159-160) It was even admitted by one of the employees, Mr. Burk, that these rules were not unreasonable. (Tr. 119)

These contentions are without merit and the holding by the Board in this particular instance is not supported by the record when viewed as a whole.

III THE JURISDICTION OF THE NLRB OVER PETITIONER.

The Respondent's contention with regard to the jurisdictional aspect of this case is that Respondent's business is strictly retail sales of items of personal property and services to the general public. That none of their items are for resale. That under these circumstances the trail examiner should have imposed the jurisdictional requirements of $500,000.00 of gross annual sales rather than the test used. The evidence in this case indicates that over 75% of Respondent's business is strictly retail sales of personal property. (Tr. Page 22, 23)

In *Yakima-Cascade Fuel Company*, 126 NLRB (No. 161) 1960 and *Tinley Park Dairy Company, dba Country Lane Food Store*, 142 NLRB (No. 80) the Board has held that where there is a mixture of retail and non-retail activities the determining factor is whether or not the major portion of the employers business is retail. In the employers business here, the transcript shows by uncontradicted testimony that 75% of

his business is retail sales. Though there are services performed, most of the services are connected with the sale of the retail items of personal property.

In the case of *Carolina Supplies and Cement Company*, 122 NLRB 17, RC Case No. 11-RC-1137 the Board stated the following with regard to its jurisdictional standards:

> "The Board has decided that it will assert jurisdiction over all retail enterprises which fall within its statutory jurisdiction and *which do a gross volume of business of at least $500,000.00 per annum.* The Board will apply this standard to the total operations of an enterprise whether it consists of one or more establishments or locations, and whether it operates in one or more states. In adopting this standard the Board has departed from its past practice of also utilizing outflow and inflow standards in aid of its jurisdictional determinations with respect to retail enterprises **** Accordingly, in the interests of expediting the handling of the increased volume of retail cases which the Board expects will result from the liberalization of its jurisdictional policies, the Board decided to apply *only* a gross volume of business standard to such enterprises. The $500,000.00 standard chosen by the Board should, in its opinion, reasonably insure that jurisdiction will be asserted over all labor disputes involving retail enterprises which tend to exert a pronounced impact upon commerce."

This particular case indicates that in the event there is any retail aspect of the business that the $500,000.00 standard will be applied. However, even if the

rule which the trial examiner followed, is applied, the major portion of the employer's business is retail, and therefore the retail standard for assumption of jurisdiction should be applied.

CONCLUSION

For the reasons stated, it is respectfully urged that a decree should not issue enforcing the board's order.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this court, and in his opinion the tendered brief conforms to all requirements.

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APPENDIX A

That relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

APPENDIX B

Idaho Code Section 44-701 is as follows:

"Declaration of policy—Collective bargaining.—In the interpretation and application of this act, the public policy of this state is declared as follows:

Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."